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Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

NEW YORK UNIVERSITY,

Petitioner,

v.

SUSAN ROGERS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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37 pp

QUESTION PRESENTED

Should an action under the Americans with Disabilities Act and the Family and Medical Leave Act be stayed because the issues are referable to arbitration under a collective bargaining agreement, pursuant to the Federal Arbitration Act?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, New York University, is a not for profit education corporation under the laws of the State of New York. New York University has no parent corporation and issues no stock.

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Appendix B — Memorandum And Order Of The United States District Court For The District Of New York Dated September 9, 1999 And Filed September 10, 1999 ..... 9a

Petitioner respectfully petitions for a writ of certiorari to review the order of the Second Circuit Court of Appeals in this case.

OPINIONS BELOW

The Second Circuit opinion (App. A) is reported at *Rogers v. New York University*, 220 F.3d 73, 164 LRRM (BNA) 2854, 6 Wage & Hour Cas. 2d (BNA) 379 (2d Cir. 2000). The district court opinion (App. B) is reported at *Rogers v. New York University*, 162 LRRM (BNA) 2294, 6 Wage & Hour Cas. 2d (BNA) 375 (S.D.N.Y. 1999).

STATEMENT OF JURISDICTION

The order of the Second Circuit Court of Appeals was entered on July 17, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which provides, in section 3, 9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been

had in accordance with the terms of the agreement, providing the applicant for the stay is not in *default in proceeding* with such arbitration.

STATEMENT OF THE CASE

The respondent Susan Rogers is a former employee of the petitioner New York University who alleges causes of action under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction), 28 U.S.C. § 1343(a)(4) (civil rights), and 29 U.S.C. § 2617(a)(2) (FMLA).

The University made a motion to stay the action and refer the issues to arbitration in accordance with section 3 of the Federal Arbitration Act (FAA). The district court denied the motion. The University appealed in accordance with section 16(a)(1)(A) of the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(A). The court of appeals affirmed.

The FAA requires in mandatory terms that a district court stay any action in which any issue in the suit is referable to arbitration under a written agreement. The claims in this case are referable to arbitration in the clearest of terms. Under the applicable collective bargaining agreement, claims of violations of federal laws against disability discrimination, as well as alleged violations of the FMLA, are subject to arbitration.[1]

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1. There is presently pending before this Court the issue of the applicability of the FAA to contracts of employment. *Circuit City Stores v. Adams*, 120 S. Ct. 2004 (May 22, 2000) (No. 99-1379). This was not an issue in the present case in the courts below.

(Cont'd)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT

The decisions of this Court have strongly endorsed the policies underlying the Federal Arbitration Act. This Court has emphasized that parties to arbitration agreements are encouraged by the FAA to have disputes removed from the courts "and into arbitration as quickly and easily as possible". *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). Congress' "preeminent concern" in passing the FAA was to enforce agreements to arbitrate. *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985).

(Cont'd)

The FAA, in section 1 (9 U.S.C. § 1), provides in part, ". . . nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Most Circuits, like the Second Circuit, have held that this exclusion applies only to employees in the transportation industries. *Eg. Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979 (2d Cir. 1997); *United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc.*, 889 F.2d 940 (10th Cir. 1989); *Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir. 1999); *Bender v. A.G. Edwards & Sons*, 971 F.2d 698 (11th Cir. 1992); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995). The Ninth Circuit has held to the contrary. *Craft v. Campbell Soup Co.*, 161 F.3d 1199 (9th Cir. 1998).

The prior decisions of this Court under the FAA have established that statutory claims, in general, are subject to arbitration by written agreement. *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc.*, 473 U.S. 614 (1985) [Sherman Act]; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) [Securities Acts]; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) [RICO]. This Court fully relied upon the principles of these cases in deciding *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, this Court, in expansive terms, held that, under a written agreement, claims under the Age Discrimination in Employment Act (ADEA) were required to be arbitrated. The Court in *Gilmer* found that the substantive objections to the arbitration of statutory claims were outdated and inconsistent with the statutory and policy endorsement of arbitration as a preferred method of dispute resolution. *Id.* at 28-30.

Amidst the strong endorsement by this Court of arbitration under the FAA, an anomaly, illustrated by the opinions below, has developed in the lower courts concerning the arbitration of statutory employment claims under collective bargaining agreements. This Court recently has recognized this anomaly and provided valuable direction on its resolution in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998). In *Wright*, this Court considered "the question whether a general arbitration clause in a collective bargaining agreement (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act. . .". *Id.* at 72. In doing so, this Court observed that this issue "brings into question two lines of our case law", represented by *Gilmer*, *supra* and *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974). *Id.* at 75. In *Gardner-Denver*, this Court held that an

arbitration award under a collective bargaining agreement's non-discrimination clause (which did not incorporate statutory provisions) did not bar a subsequent suit under Title VII of the Civil Rights Act of 1964. The Court acknowledged in *Wright* that "[t]here is obviously some tension between these two lines of cases." *Id.* at 76.

That "tension" could not be resolved definitively by the Court in *Wright* — as it can be in this case — because the CBA in *Wright* had no non-discrimination provision at all and "contains no explicit incorporation of statutory anti-discrimination requirements." 520 U.S. at 80. The Court in *Wright* recognized that *Alexander v. Gardner-Denver* had lost at least some of its vitality and noted "whether or not *Gardner-Denver's* seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." *Id.* The Court did not uphold the lower court's dismissal in *Wright* because the CBA did not contain "a clear and unmistakable incorporation of employment-discrimination laws." *Id.* at 81. The employer's argument in *Wright* regarding the rather general provisions of the CBA was found wanting by the Court because "that is not the same as making compliance with the ADA a commitment that would be subject to the arbitration clause." *Id.* The Court also noted that "[i]t may well be that ordinary textual analysis of the CBA will show that matters which go beyond the interpretation and application of contract terms are subject to arbitration", but the Court would not presume that to be the case. *Id.* at 79.

In this case, the CBA provisions at issue hardly could be more explicit. Federal anti-discrimination statutory provisions are clearly incorporated in the agreement and alleged violations are subject to arbitration. The "ordinary textual analysis" referred to by this Court in *Wright* compels the conclusion that the issues are referable to arbitration. Unlike *Wright*, the CBA here *does* contain the "explicit incorporation of statutory anti-discrimination requirements."

The CBA in this case provides that "There shall be no discrimination as defined by applicable Federal, New York State and New York City laws . . ." (App. p. 2a), and that "Employees are entitled to all provisions of the Family and Medical Leave Act of 1993 that are not specifically provided for in this Agreement" (App. p. 2a). The Court in *Wright* gave valuable and explicit guidance on the question of what type of contractual provisions would require arbitration. Those are the provisions before this Court in this case, an agreement with the "explicit incorporation of statutory anti-discrimination requirements," to which the Court in *Wright* referred.

The uncertainty in the lower courts is reflected in the Second Circuit's opinion here. The Second Circuit's "Reason #1" for its opinion (App. p. 3a) relies exclusively upon *Gardner-Denver* without reference to this Court's guidance in *Wright*.[2] The Court's "Reason #2" construes this Court's

2. While the court below reads *Gardner-Denver* as a sweeping prohibition on the arbitration of statutory claims under a collective bargaining agreement, this Court in *Gardner-Denver*, while holding that an arbitration award would not bar a subsequent action, clearly recognized, and strongly endorsed, that arbitration under collective bargaining agreements did and would continue to resolve many claims of employment discrimination. 415 U.S. at 55.

guidance in *Wright* so narrowly as to make it virtually indistinguishable from its "Reason #1".

The Court below grafted on to this Court's statement in *Wright* that there be an "explicit incorporation of statutory anti-discrimination requirements" the condition, not set forth in *Wright*, that the collective bargaining agreement identify "the anti-discrimination statutes by name or citation" (App. p. 7a). The collective bargaining agreement provision here ("There shall be no discrimination as defined by applicable Federal . . . laws") is more effective than the rote recitation of statutory citations (which may have little meaning to employees consulting the text) and has the further advantage of incorporating anti-discrimination requirements as they may be amended or as new statutory provisions are adopted from time to time.

The provisions of the CBA in this case, clearly incorporating statutory claims, provides this Court with the opportunity, not present in *Wright*, to decide whether such provisions in CBAs are effective, particularly in view of Congress' endorsement of the arbitration of ADA claims.[3]

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3. The American with Disabilities Act, in 42 U.S.C. § 12212, provides: ". . . where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter."

II.

THE CIRCUITS ARE IN CONFLICT AND THE QUESTION IS IMPORTANT

Collective bargaining agreements in the United States customarily include non-discrimination clauses and comprehensive arbitration provisions. As the court below noted (App. p. 4a) the majority of Circuits appear to adhere to an interpretation of this Court's opinion in *Gardner-Denver* which makes virtually any agreement to arbitrate these claims not effective. Most of these Circuit decisions came before this Court's opinion in *Wright*. The Fourth Circuit has held to the contrary, enforcing the agreements, as would be the case with virtually any other subject matter covered by the FAA. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

The petition here presents the Court with the important opportunity to decide the question not presented squarely in *Wright* and to harmonize this area of the law with the Court's arbitration jurisprudence.

CONCLUSION

For the reasons set forth above, the petition for a writ certiorari should be granted.

Respectfully submitted,

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